IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.65 of 1996
With
CMP No.469 of 2007.

Reserved on: July 10, 2007

Decided on: August 17, 2007.

Banti Devi ***.....Appellant.***

VERSUS

Sita Ram & Ors. ***.....Respondents.***

Coram

The Hon'ble Mr.Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] Yes

For the Appellant: **Pt.Om Parkash, Advocate.**

For the Respondents: **Mr.K.D.Sood with Mr.Sanjeev Sood, Advocates.**

Kuldip Singh, Judge

The defendant No.1, Smt.Banti Devi, is in appeal against the judgment and decree dated 1.1.1996 passed by learned District Judge, Hamirpur in Civil Appeal No.104 of 1990 reversing the judgment and decree dated 26.5.1990 passed by learned Sub Judge 1st Class(II), Hamirpur in Civil Suit No.210 of 1986. The parties are referred in the same manner as in the trial Court.

2. The facts, in brief, are that plaintiff Sita Ram filed a suit for declaration that he, along with defendants No.1 to 3, is joint owner in possession of the suit land on the basis of Will dated 6.4.1984 of

---

[1] ***Whether the reporters of the local papers may be allowed to see the Judgment? Yes***

Khazana, the suit land has been described in detail in the plaint. He also prayed for permanent prohibitory injunction against defendant No.1 from changing the nature of the suit land till partition. The case of the plaintiff is that Khazana executed a Will dated 6.4.1984 in favour of plaintiff and defendants No.1 to 3 of the suit land. The defendant No.1 being a clever lady got the mutations No.208 and 182 sanctioned in her favour in collusion with revenue staff and such mutations are not binding on plaintiff.

3. The suit was contested by defendant No.1 on the grounds of *locus standi,* estoppel, valuation and maintainability. On merits, she has submitted that she is owner in possession of the suit land on the basis of registered Will dated 7.12.1967 executed in her favour by Khazana. She is the grand daughter of deceased Khazana. She denied execution of Will dated 6.4.1984 in favour of plaintiff and other defendants. The mutations No.208 and 182 were rightly sanctioned in her favour by the revenue officers. Khazana resided with her throughout his life and his last rites were also performed by her.

4. The trial Court has held that Will dated 6.4.1984 Ext.P-1 is shrouded with suspicious circumstances which plaintiff being the propounder of the Will has failed to remove and dismissed the suit on 26.5.1990. Sita Ram plaintiff filed appeal against the decision dated 26.5.1990 which has been allowed by learned District Judge, Hamirpur on 1.1.1996. The defendant No.1 Smt.Banti Devi is in second appeal.

The appeal has been admitted on the following substantial questions of law:-

(i) *Whether the judgment and decree of the First Appellate Court is liable to be dismissed because the ld. District Judge has failed to consider the circumstances and suspicions surrounding the execution of the Will Ext.P-1?*

(ii) *Whether the plaintiff / respondent has utterly failed to prove on record that the Will Ext.P-1 is genuine?*

(iii) *Whether the plaintiff on the strength of the alleged Will in his favour can maintain a suit for declaration simplicitor on the basis of joint possession under the alleged Will particularly when one Court has come to the conclusion that the Will is not genuine. In addition to the same finding by the Sub Registrar when the alleged Will was presented for registration under Section 40/41 of the Indian Registration Act?*

5. I have heard the learned counsel for the parties and gone through the record.

6. The learned counsel for the appellant / defendant No.1 has submitted that appellant has filed an application being CMP No.469 of 2007 under Order 41 Rule 27 C.P.C. for proving the fact that Amar Nath, real brother of Sita Ram, had filed an application

before Sub Registrar, Hamirpur for registration of Will dated 4.6.1984 but the Sub Registrar, Hamirpur rejected the request of Amar Nath vide order dated 22.7.1991, he, therefore, prayed for leading additional evidence to prove certified copy of order dated 22.7.1991, a copy of which has also been placed on record. He has also submitted that Will Ext.P-1 is shrouded by suspicious circumstances which have not been explained by propounder of the Will, namely, plaintiff. The Will has not been proved to be executed in accordance with Section 63 of the Indian Succession Act. The lower appellate Court has misconstrued and misinterpreted the material on record regarding the genuineness of Will Ext.P-1. The learned counsel for respondents has supported the impugned judgment and decree. He has opposed the application under Order 41 Rule 27 C.P.C. of the appellant on the ground that no case has been made out for leading additional evidence.

7. In the application under Order 41 Rule 27 C.P.C. the appellant has submitted that she could not tender order dated 22.7.1991 in evidence inadvertently. The additional evidence can be allowed on well known grounds provided under Order 41 Rule 27 C.P.C. The certified copy of order dated 22.7.1991 now sought to be proved by way of additional evidence was taken on 11.9.1991. The appeal in the lower appellate Court was filed on 14.8.1990 and it was decided on 1.1.1996. The appellant took no steps for leading additional evidence in lower appellate Court. In the application nothing

has been stated as to why the application for additional evidence was not filed in the lower appellate Court. The appellant has failed to make out any case for leading additional evidence for placing on record certified copy of order dated 22.7.1991. Hence, CMP No.469 of 2007 is dismissed.

Substantial Questions of Law No.(i) to (iii):

8. The substantial questions of law No.1 to 3 are interconnected and, therefore, are being disposed of collectively. The Will is to be executed in accordance with Section 63 of the Indian Succession Act, 1925 which is reproduced as follows:-

> "***63. Execution of unprivileged Wills.-*** Every testator, not being a soldier employed in an expedition or engaged in actual warfare [or an airman so employed or engaged] or a mariner at sea, shall execute his Will according to the following rules:-
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
>
> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence

> and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

9. It is admitted case of the parties that Khazana earlier executed Will Ext.DW-2/A dated 7.12.1967. The Will Ext.DW-2/A is registered and is in favour of defendant No.1. At the time of execution of Will Ext.DW-2/A, age of Khazana was 72 years. The Will Ext.DW-2/A is thumb marked by Khazana. The reference of earlier Will in favour of defendant No.1 Banti Devi is there in Will Ext.P-1. The question is whether Will Ext.P-1 has been proved to be executed by Khazana and the plaintiff has removed all suspicious circumstances.

10. In the year 1984 Khazana was about 89 years old. The Will Ext.P-1 was allegedly executed by Khazana in favour of Sita Ram, Amar Nath, Manohar Lal and Banti. Amar Nath and Sita Ram are real brothers. The marginal witnesses of the Will Ext.P-1 are PW-4 Bhagirath and PW-6 Kishore Kumar. The scribe of Will Ext.P-1 is PW-5 Piar Chand. Khazana was resident of village Khaneu. PW-4 Baghirath has stated that Khazana executed Will Ext.P-1 on 6.4.1984 in favour of Banti, Amar Nath, Manohar Lal and Sita Ram which was scribed by Piar Chand, Numberdar. The Will was readover to

Khazana, who, after accepting its correctness, signed the Will. He has identified his signatures on Will Ext.P-1. The second witness of the Will, according to PW-4, was Kishore Kumar. He has nowhere stated that the Will was signed by him and other witness Kishore Kumar in the presence of Khazana. In cross examination, he has admitted that he has no land in Tikka Khaneu nor Kishore Kumar witness and Piar Chand, scribe of the Will, have land in Tikka Khaneu. The residence of PW-4 Bhagirath is 2 ½ Kilometres from Khaneu, the residence of PW-6 Kishore Kumar is 1 ½ Kilometres and that of PW-5 Piar Chand 3 kilometres from Khaneu. There are about 20/25 houses in village Khaneu. Amar Nath was present at the time of execution of the Will, pen, paper were supplied by Amar Nath. Khazana used to live separately in his own house. Banti is the grand daughter of Khazana. Both the parties used to look after Khazana. He has admitted that Khazana earlier executed a registered Will in favour of Banti Devi. The Will was executed at the residence of Amar Nath. He is *Bhalora* (close relative) of Amar Nath. He never visited Khaneu prior to 6.4.1984. He denied suggestion that Khazana used to put thumb mark.

11. PW-6 Kishore Kumar has stated that the earlier Will which was executed by Khazana in favour of Banti Devi was cancelled and PW-5 Piar Chand, Numberdar scribed Will dated 6.4.1984 which was read over to Khazana, who, after accepting its correctness, signed the Will. He was in sound disposing mind. He also signed the

Will and the other witness was Bhagirath. PW-6 has not stated that Will was scribed by PW-5 Piar Chand on the instructions of testator. He has also not stated that he and the other marginal witness signed the Will in the presence of testator. In cross examination, he has stated that both the parties used to look after the testator. He has stated that he was called by Amar Nath and Bhagirath was there before he reached. He has also stated that Amar Nath called PW-5 Piar Chand. He has stated that Khazana was suffering from dysentery and was not in a position to move about. He died 2/3 months after the execution of the Will. He has shown his ignorance that Khazana used to affix his thumb mark.

12. PW-5 Piar Chand has stated that Will Ext.P-1 was scribed by him on 6.4.1984. In cross examination he has admitted that there are about 25/30 houses in village Khaneu. He was called by Amar Nath. Pen and paper for scribing the Will were supplied by Amar Nath. Khazana was ill and was suffering from dysentery. He was not in a position to move about. He has denied that Khazana used to affix thumb mark but asserted that he used to sign. The Will was scribed at the residence of Amar Nath. He never visited Khaneu after scribing the Will. He did not visit the house of Khazana prior to scribing the Will.

13. It has come on record that testator was 89 years of age at the time of execution of Will Ext.P-1. He was not keeping good health and was suffering from dysentery and was not in a position to move

about and died 3/4 months thereafter. Khazana had already executed Will Ext.DW-2/A in favour of Banti Devi. It has not been explained by the propounder of the Will what were the compelling reasons for executing the Will Ext.P-1 when Khazana had already executed Will Ext.DW-2/A in favour of Banti Devi, his grand daughter. Khazana was living separately. It has not been explained as to why the Will was executed at the residence of Amar Nath beneficiary and not at the residence of testator. Amar Nath, one of the beneficiary of the Will, has actively participated in the execution of the Will. He called the attesting witness PW-6 Kishore Kumar and the scribe. PW-5 has stated that he never visited the house of Khazana before and after 6.4.1984 and PW-4 has stated that he never visited village Khaneu prior to 6.4.1984. There is evidence on record that there are about 20/25 houses at village Khaneu but why the attesting witnesses from village Khaneu were not joined for execution of the Will and why the attesting witnesses from far away places were called to attest the Will, has not been explained. The genuineness of Will Ext.DW-2/A has not been disputed by the plaintiff, rather his witnesses have admitted that earlier Khazana had executed Will in favour of Banti Devi and reference of that Will has also been mentioned in Ext.P-1. The Will Ext.DW-2/A is thumb marked by Khazana but Will Ext.P-1 is allegedly signed by him. This discrepancy has also not been explained by the propounder of the Will. No doubt, registration of Will is not statutory requirement but the fact cannot be ignored that Khazana was aware of

the importance of the registration of Will, therefore, he got registered Ext.DW-2/A which was executed by him on 7.12.1967 and why Will Ext.P-1 was not registered has again not been explained. In these circumstances, non registration of Ext.P-1 is also a circumstance which creates suspicion. The marginal witnesses PW-4 and PW-6 have not proved the attestation of the Will in accordance with Section 63 of the Indian Succession Act. They have not stated that they attested and signed the Will Ext.P-1 in presence of Khazana. In ***Benga Behera & Anr. Versus Braja Kishore Nanda & Ors. [2007 (7) SCALE 228],*** the Apex Court in Para-40 has held as follows:-

> "It is now well settled that requirement of the proof of execution of a Will is the same as in case of certain other documents, for example Gift or Mortgage. The law requires that the proof of execution of a Will has to be attested at least by two witnesses. At least one attesting witness has to be examined to prove execution and attestation of the Will. Further, it is to be proved that the executant had signed and / or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant."

The attestation of Will Ext.P-1 has not been proved in accordance with Section 63 of the Indian Succession Act.

14. The learned counsel for the respondents has submitted that the lower appellate Court has recorded findings on execution of

Will Ext.P-1 after appreciating the evidence on record and this Court in second appeal will not re-appreciate the evidence and take a contrary view. The question here is not the appreciation of the evidence but the question is whether Will Ext.P-1 has been executed and attested in accordance with Section 63 of the Indian Succession Act and whether the lower appellate Court has drawn right inference from the evidence on record. In ***Ram Lal and Another Vs. Phagua and Others [(2006) 1 SCC 168],*** the Hon'ble Supreme Court in Para-22 has held as follows:-

> "The case of *Indira Kaur v. Sheo Lal Kapoor* was cited by the learned Senior Counsel appearing for respondent 1 in regard to the scope of Article 136. In the above judgment, this Court in para 7 held that Article 136 does not expressly forge any fetters on the power of this Court to interfere with the concurrent findings of fact. Though, this power has to be exercised sparingly but if and when the Court is satisfied that grave injustice has been done it is not only the right but also the duty of the Court to reverse the error and the injustice and to upset the finding notwithstanding the fact that it has been affirmed earlier. This Court also held that it is not the number of times that a finding has been reiterated that matters. What really matters is whether the finding is a manifestly unreasonable and unjust one in the context of the evidence on record. This judgment squarely applies to the case on hand. In the instant case, the High Court has rightly exercised its right and discharged its duty to

> reverse the error and removed the injustice done by the courts below. The High Court is right in exercising its duty, rightly so in interfering with unreasonable and unjust findings by both the courts below."

The lower appellate Court has not drawn correct inference from the material on record regarding the execution of the Will Ext.P-1 nor proper inference has been drawn from the evidence regarding the suspicious circumstances shrouded with the execution of the Will. The plaintiff has not explained various suspicious circumstances discussed above regarding the execution of the Will. The lower appellate Court has erred in returning the finding regarding the execution of Will Ext.P-1, therefore, in view of ***Ram Lal's case (supra),*** in the facts and circumstances of the case, this Court has duty to reverse the error committed by the lower appellate Court regarding the finding on execution of Will Ext.P-1. The substantial questions of law No.(i) to (iii) are decided in favour of defendant No.1 / appellant and against the respondents and, therefore, impugned judgment and decree are set aside.

15. The result of above discussion is that appeal is allowed, judgment and decree dated 1.1.1996 passed by District Judge, Hamirpur in Civil Appeal No.104 of 1990 are set aside, suit of the plaintiff is dismissed, judgment and decree dated 26.5.1990 passed by learned Sub Judge 1st Class (II), Hamirpur in Civil suit No.210 of 1986 are restored. No costs.

16. CMP No.469 of 2007 is dismissed, as discussed above.

August 17, 2007. **(*Kuldip Singh*)**
(soni) ***Judge***